INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Summary of argument	10
Argument	11
I. The documents described in the dismissed counts were mailed in execution of the scheme to defraud and fall under the prohibition of the mail fraud statute	11
A. Looking only to the immediate victims, the mailings furthered, the scheme by thwarting, discouraging, or at least delaying, efforts at recovery of monies already paid over	14
B. Considering the continuing nature of the overall plan, the mailings furthered the scheme by lulling past victims into inaction so as to prevent disclosure and permit the defrauding of future victims.	17
II. The conspiracy count is amply supported by the remaining substantive counts	21
Conclusion	23

656325—62——1

CITATIONS

Cases:

	Page
Allen v. *United States*, 4 F. 2d 688, certiorari denied *sub nom. Mullen* v. *United States*, 267 U.S. 598	22
Badders v. *United States*, 240 U.S. 391	11
Blue v. *United States*, 138 F. 2d 351, certiorari denied, 322 U.S. 736	14
Bogy v. *United States*, 96 F. 2d 734, certiorari denied, 305 U.S. 608	14
Brady v. *United States*, 26 F. 2d 400, certiorari denied, 278 U.S. 621	19
Clark v. *United States*, 208 F. 2d 840, certiorari denied, 346 U.S 865	14
Corbett v. *United States*, 89 F. 2d 124	19
Davis v. *United States*, 125 F. 2d 144	14
Dyhre v. *Hudspeth*, 106 F. 2d 286	12–13
Farmer v. *United States*, 223 Fed. 903, certiorari denied, 238 U.S. 638	19, 20
Ford v. *United States*, 273 U.S. 593	22
Getchell v. *United States*, 282 F. 2d 681	13
Kann v. *United States*, 323 U.S. 88	9, 12, 14, 21
Lewis v. *United States*, 38 F. 2d 406	19
Marshall v. *United States*, 146 F. 2d 618	19
Mitchell v. *United States*, 118 F. 2d 653	12
Parr v. *United States*, 363 U.S. 370	9, 12
Pereira v. *United States*, 347 U.S. 1	11–12
Preeman v. *United States*, 244 Fed. 1, certiorari denied, 245 U.S. 654	14
Salinger v. *United States*, 272 U.S. 542	22
Stapp v. *United States*, 120 F. 2d 898	12
United States v. *Cohen*, 145 F. 2d 82, certiorari denied, 323 U.S. 799	19
United States v. *Comyns*, 248 U.S. 349	21
United States v. *Earnhardt*, 153 F. 2d 472, certiorari denied, 328 U.S. 858	19

Cases—Continued

	Page
United States v. *Goodman*, 285 F. 2d 378, certiorari denied, 366 U.S. 930	22
United States v. *Halseth*, 342 U.S. 277	7
United States v. *Hoy*, 330 U.S. 724	7
United States v. *Riedel*, 126 F. 2d 81	15
United States v. *Strauss*, 283 F. 2d 155	22
Statutes:	
18 U.S.C. 371	3
18 U.S.C. 1341	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 69

UNITED STATES OF AMERICA, APPELLANT

v.

RALPH L. SAMPSON, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 55–63) is not reported. The opinion of the court of appeals certifying the appeal to this Court (R. 67–70) is reported at 298 F. 2d 826.

JURISDICTION

The judgment of the district court was entered on March 1, 1961 (R. 55, 60, 64). On March 30, 1961, the government filed a notice of appeal to the Court of Appeals for the Fifth Circuit (R. 65–66). On January 18, 1962, the court of appeals, holding that the judgment dismissing 35 counts of the indictment involved a construction of the mail fraud statute, certified the appeal to this Court pursuant to 18

U.S.C. 3731 (R. 67–70, 71). On February 23, 1962, the government moved this Court to remand the case to the court of appeals, contending that the appeal had properly been taken to that court. On April 2, 1962, this Court denied the government's motion and noted probable jurisdiction (369 U.S 836; R. 72). The jurisdiction of this Court rests upon 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether, in a continuing scheme to defraud, designed to mulct as many members of the public as possible, the use of the mails for the purpose of delaying or discouraging efforts at recovery by victims who have already parted with their money, and for the further purpose of lulling past victims into inaction so as to prevent disclosure and permit the defrauding of future victims, is a mailing in execution of the scheme within the proscription of the mail fraud statute.

2. Whether, assuming the correctness of the district court's ruling dismissing 34 of the 43 substantive counts, it was error to dismiss the conspiracy count, which charged as objective offenses the mailings recited in the substantive counts sustained by the court as well as the mailings involved in the dismissed counts.

STATUTE INVOLVED

Section 1341 of Title 18 of the United States Code provides in pertinent part:

> § 1341. *Frauds and swindles.*
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false

> or fraudulent pretenses, representations, or promises, * * * for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, * * * or knowingly causes to be delivered by mail according to the direction thereon, * * * any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT

1. Count 1 (R. 1–14) of a 44-count indictment (R. 1–34), filed April 29, 1960, in the United States District Court for the Northern District of Georgia, charged the appellees—23 individual defendants and Lenders Service Corporation—with having knowingly deposited in the mails, for the purpose of executing a scheme and artifice to defraud, a described envelope and its contents, in violation of 18 U.S.C. 1341, *supra*. Counts 2 to 43, inclusive (R. 14–31), charged 42 additional mailings in furtherance of the scheme. Count 44 (R. 31–34) charged the same defendants with having conspired to use the mails in furtherance of the scheme, in violation of 18 U.S.C. 371.

On March 1, 1961, the district court, on appellees' motion, dismissed all but nine of the counts (2, 7, 12, 16, 31, 33, 38, 40 and 41) on the ground that the counts stricken failed to charge federal offenses (R. 60). From this order the government appealed to the Court of Appeals for the Fifth Circuit (R. 65–66), which held that the judgment of dismissal involved construction of the mail fraud statute and, accord-

ingly, certified the appeal to this Court (R. 67–70, 71).

2. Briefly summarized, the scheme charged (R. 3–14) was as follows:

The individual defendants planned to defraud businessmen throughout the country who wished to sell their businesses or obtain business loans by pretending to assist them in the realization of one or the other of these objectives, in return for a fee (R. 2, 3–4). To this end, corporations were organized (including the defendant Lenders Service Corporation), salesmen were hired and trained, and advertisements and other promotional material disseminated (R. 3–5). The defendants, in fact, never intended to perform the services for which they contracted. They would not procure buyers for victims who wished to sell their businesses, or bring prospective purchasers into contact with them; nor would they make any attempt to obtain business loans for those who wanted them (R. 7).

After the owner or operator of a business showed interest in the defendants' services, they would dispatch a salesman to persuade the prospect to enter into a contract (relating to the sale of his business or the procurement of a loan, as the case might be) and to pay an advance fee (R. 5–6). The victim would be told that his advance would be refunded if his application for the defendants' services was not "accepted" at one of their regional offices, but that, if the application was accepted and the advance fee was retained, this meant the promised valuable services would be rendered (R. 7).

The plan was to accept every such application indiscriminately, if accompanied by the prescribed "advance," without regard to the applicant's financial condition, his ability to obtain a loan, or the possibility of selling his business (R. 7–8). The application would be rejected if the intended victim had not signed the form, had stopped payment on his check before the defendants could cash it, or had not forwarded the full amount of the advance fee (R. 8).

Following acceptance, the plan called for mailing to the victim a signed copy of the accepted agreement, together with a form letter stating that the application had been accepted (R. 8). This, it was anticipated, would lull the victim into believing that he would soon receive the benefit of the valuable services specified in the agreement, and that, in any event, he could no longer cancel the contract and obtain a refund of his advance fee (*ibid.*). If the application was for asistance in obtaining a loan, the defendants would compile in rudimentary form the financial data which had been obtained from the victim and would then forward these so-called "business and financial reports" to a few lending agencies. Such reports would be sent without any regard to, or attempt at correlation between, the type or size of the loan sought and the loans handled by these agencies (R. 8–9). Finally, the defendants would write their "clients" advising them of this action, in a further attempt to convince them that they had not been defrauded and

that valuable services were indeed being performed on their behalf (R. 9).

Upon receipt of complaints from the victims regarding false statements and promises made to them by the salesmen or field representatives, the defendants would pretend to investigate. They would encourage the field representatives to deny having made the misrepresentations alleged and would then write the victim that, in view of the salesman's denial, they could not refund the fee. In refusing to make refunds the defendants again would misrepresent the services already performed and to be performed (R. 9).

3. Each of the 43 substantive counts, except counts 40 and 41, charged a separate mailing of "an envelope and contents" to a specified addressee for the purpose of executing the scheme (R. 14–28, 30–31). Counts 40 and 41 charged the mailing, in furtherance of the scheme, of copies of newspapers containing advertisements for salesmen (R. 28–30).

On November 10, 1960, the defendants moved to dismiss all counts of the indictment on the ground that they failed to charge offenses against the laws of the United States (R. 35). They also filed a motion for a bill of particulars (R. 60). In opposing the motion to dismiss, the government filed a "supplemental brief" (R. 37–54) which the district court treated as a bill of particulars (R. 64).[1] The govern-

[1] As originally ntered, the order of March 1, 1961 overruled the defendants' motion for a bill of particulars (R. 62). On April 3, 1961, the court amended the order, *nunc pro tunc*, granting the motion to the extent of permitting the description of the mailings contained in the government's supplemental

ment stated in the supplemental brief that the mailings involved in the substantive counts consisted of three types of documents (R. 37). The first type, supporting 34 counts (all except counts 2, 7, 12, 16, 31, 33, 38, 40 and 41), was the "customer's copy" of the "Financial Service Agreement," showing acceptance of the application for the defendants' services in obtaining a business loan, which was mailed to the victim after he had sent in his check for the advance fee (see *supra*, pp. 4–5) (R. 37–38). The other two types were (1) a brochure entitled "When Our Representative Calls," or some similar title, which was mailed to the victim before the salesman's visit and before he made any payment (involved in counts 2, 7, 12, 16, 31, 33 and 38), and (2) newspaper advertisements soliciting salesmen (counts 40 and 41) (R. 37, 52–54).

A copy of one of the "Financial Service Agreements" (that involved in count 3) was appended to the supplemental brief (R. 51), together with a copy of the form letter which accompanied the accepted agreement when it was mailed to the victim (R. 50). The agreement provides that the applicant will pay Lenders Service Corporation $900 for its services in attempting to arrange for a $20,000 loan. Of this amount, $200 is indicated as having been paid on the date of the signing of the application (June 11, 1958); a second payment, of $250, is stated to be due on or

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brief in opposition to the motion to dismiss to serve as a bill of particulars (R. 64). On the propriety of considering a bill of particulars in ruling on a motion to dismiss, see *United States* v. *Hoy*, 330 U.S. 724, 725, 730; *United States* v. *Halseth*, 342 U.S. 277, 278–279.

before a subsequent date (June 20, 1958); and the final payment, of $450, is to be made "when loan is made." The agreement provides that it will become effective "when accepted at any Regional Office of Lenders Service Corporation"; that notification of acceptance will be made by returning a copy of the agreement to the applicant, duly executed by an officer of the corporation; and that, in the event the agreement is not accepted by the company, "the entire fee will be refunded." The agreement is declared to be "not cancellable after acceptance" by the company—for the reason that immediately upon acceptance the company is to render services to the applicant based upon the latter's "Preliminary Data Report." The exhibit agreement had been "accepted" by a regional director of Lenders Service Corporation, at Atlanta, Georgia, on June 16, 1958 (R. 51).

The accompanying form letter thanks the recipient for the confidence he has expressed in Lenders Service Corporation by retaining it to represent him, and informs him that the acceptance copy of his Financial Service Agreement, properly executed, is enclosed. The letter also refers to additional enclosures, described as "authorization cards," which the recipient was instructed to sign and mail to designated individuals and companies (an "accountant," a "bank," and two "suppliers"). Another enclosure, consisting of a "personal history form" was to be filled out by the addressee and returned to Lenders Service Corporation. The letter advises that as soon as all the enclosed material has been received by Lenders Service Corporation the corporation will send the recipient a "proof

copy of our Business and Financial Report" "for your approval" and expresses the hope that the company's work in the addressee's behalf will result "in complete satisfaction" (R. 50). In each instance, the accepted agreement and the accompanying letter were sent to the victim by certified mail, "return receipt requested" (R. 38, 49).

The government conceded that, after obtaining the advance fee, the defendants had no intention of earning the balance due on the service contracts. No further payments were expected to be got from the victim.

4. On March 1, 1961, the district court granted the motion to dismiss as to the 34 substantive counts based upon the "contract mailings," and the conspiracy count (count 44), and overruled the motion as to the nine counts involving the brochures and newspaper advertisements (R. 55–60). The court quoted statements from the opinions of this Court in *Kann* v. *United States*, 323 U.S. 88, 95, and *Parr* v. *United States*, 363 U.S. 370, 391, to the effect that the mail fraud statute "does not purport to reach all frauds but *only those limited instances in which the use of the mails is a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law"; and that "only mailings which are 'a part of the execution of the fraud' or *'incident to an essential part of the scheme'* fall within the ban of the federal mail fraud statute" (emphasis by the district court) (R. 59–60). After denying the motion as to the counts involving the brochures and newspaper advertisements, the court held (R. 60):

It appears that the mailings involved in the remaining counts of the indictment relate to transactions where money had already been obtained from the victims prior to such mailings. This subsequent use of the mails under the holdings in the *Parr* and *Kann* cases, *supra,* and the case of *Getchell* v. *United States,* 5 Cir., 282 F. 2d 681, were not for the purpose of "executing" the scheme.

SUMMARY OF ARGUMENT

1. Dismissal of 34 counts of the indictment based on mailings effected after the addressee had already parted with his money was error. It is true the mail fraud statute does not reach every use of the mails connected with a scheme to defraud; it prohibits only those which advance the plan. But the scheme is not always concluded when the victim's money changes hands. Thus, here, mailing accepted copies of the service agreements, together with the accompanying letters, served two purposes in furtherance of the scheme to defraud.

a. Most immediately, looking only to the particular victim, these communications were designed to make it possible for the swindlers to keep what they so far held only precariously. Since the "advances" received were, as a matter of contract, refundable until the applications were accepted, notification of acceptance was an essential prerequisite to obtaining even color of title to the monies. Thereafter, the victim might think himself cut off from demanding a refund. Moreover, by indicating that substantial services were being performed, the mailings would tend to discourage efforts at recovery, even after

the victim had begun to suspect that he had been defrauded.

b. Delaying the victim's discovery of the fraud also served a larger purpose. The scheme was not limited to a single victim, or even to a small group. The real success of the plan depended upon defrauding a very large number of businessmen, over an extended period. Accordingly, it was essential to pacify past victims, in order to avert adverse publicity which might warn off prospective future victims and forestall an official investigation which would cut short the fradulent operation.

2. In any event, dismissal of the conspiracy count was error. That charge was grounded not only on the dismissed counts, but also on the remaining counts of the indictment. Accordingly, it was adequately supported. The proper remedy was to limit the government's proof under the conspiracy charge to the offenses alleged in the sustained counts.

ARGUMENT

I. THE DOCUMENTS DESCRIBED IN THE DISMISSED COUNTS WERE MAILED IN EXECUTION OF THE SCHEME TO DEFRAUD AND FALL UNDER THE PROHIBITION OF THE MAIL FRAUD STATUTE

The mail fraud statute (*supra*, pp. 2–3) prohibits the use of the mails "*for the purpose of executing*" a scheme or artifice to defraud. It is not enough that the mailing is somehow connected to a fraudulent plan. The use of the mails must be "a step in [the] plot," *Badders* v. *United States*, 240 U.S. 391, 394, "incident to an essential part of the scheme," *Pereira* v.

United States, 347 U.S. 1, 8. In one way or another, the mailing must *further* the plan.

It follows, of course, that the statute does not reach a purely incidental use of the mails which is a mere by-product of the scheme, contributing nothing to its success. The decisions in *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, 392–393, are no more than applications of this principle. Thus, in *Kann*, the mailing by one bank to another of checks cashed or deposited by the swindlers were held transactions "merely incidental and collateral to the scheme and not a part of it" (323 U.S., at 95), the Court noting that "[i]t was immaterial to [the defendants], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." *Id.*, at 94. Similarly, in *Parr*, the Court required the dismissal of three mail fraud counts supported only by the mailing of invoices for gasoline and other service station products by the oil company to a school district whose credit card the defendants had improperly used for their own benefit, and the district's mailing of a check in payment of one of these purchases. Here, again, "It was immaterial to them, or to any consummation of the scheme, how the [oil company] * * * would collect from the [District]." 363 U.S. at 393 (brackets in original).[2]

[2] See also, *Stapp* v. *United States*, 120 F. 2d 898 (C.A. 5) (bank transactions after victim's check in oil fraud had been cashed); *Mitchell* v. *United States*, 118 F. 2d 653 (C.A. 10) (victim's mailing of oil lease assignment to land office for recordation after being defrauded); *Dyhre* v. *Hudspeth*, 106

Kann and *Parr* also illustrate another truth: that often, perhaps usually, what happens after the swindlers have gotten their money is harmless, since it does not advance the plan. That is characteristic of "one-shot" swindles, for the defrauder in such cases will normally leave town immediately after putting the money in his pocket, caring nothing how soon the victim discovers his plight. That may sometimes also be true of more complicated schemes, involving many frauds against a single victoim: so long as each transaction is independent of the others, it may not matter to the swindlers what occurs after the particular fraud has succeeded. But if fruition often ends the defrauder's interest in the immediate transaction, it is not always so. Neither *Kann* nor *Parr* erects a mechanical rule that every mailing occurring after the money has changed hands is innocent. On the contrary, in *Kann* the Court expressly excepted from the rule "cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpetrated." 323 U.S., at 94–95.

The real basis for decision in *Kann* and *Parr* was that the mailings involved, over which the defendants had no control, were mere results, in no way advancing the plan. The only rule to be distilled from the cases is that the reach of the federal mail fraud statute is restricted to "those limited instances in which the use of the mails is a part of the execution of the fraud"

F. 2d 286 (C.A. 10) (bank transactions after bad checks had been cashed or negotiated). Cf. *Getchell* v. *United States*, 282 F. 2d 681, 683–688 (C.A. 5).

(323 U.S., at 95), with perhaps a caveat to the effect that mailings occurring after the fruits of the fraud have been obtained will usually, though not always, be deemed to fall outside the ban of the statute.

What, then, of our case? How did the mailings at issue, coming as they did after the victim had given all that was expected of him, further the scheme to defraud? We suggest they advanced the plot in two distinct ways, and that either contribution is sufficient to support the allegation that the described use of the mails violated the statute.

A. LOOKING ONLY TO THE IMMEDIATE VICTIMS, THE MAILINGS FURTHERED THE SCHEME BY THWARTING, DISCOURAGING, OR AT LEAST DELAYING, EFFORTS AT RECOVERY OF MONIES ALREADY PAID OVER

The purpose of a scheme to defraud is not simply to obtain possession of the victim's money; the equally important objective is to retain it. "[T]he scheme described in the indictment was not the bare taking of the money * * *. * * * It encompassed an intention * * * also to keep it. Thus any action on the part of appellant which represented * * * efforts by him to keep the money, constituted activities 'for the purpose of executing such scheme or artifice or attempting so to do.'" *Clark* v. *United States*, 208 F. 2d 840, 841 (C.A.D.C.), certiorari denied, 346 U.S. 865: See also *Blue* v. *United States*, 138 F. 2d 351, 359 (C.A. 6), certiorari denied, 322 U.S. 736; *Davis* v. *United States*, 125 F. 2d 144 (C.A. 6); *Bogy* v. *United States*, 96 F. 2d 734, 740 (C.A. 6), certiorari denied, 305 U.S. 608; *Freeman* v. *United States*, 244 Fed. 1, 9–10 (C.A. 7), certiorari denied, 245 U.S. 654. As *Kann* v. *United States* implies, the scheme in each case reaches fruition only when "[t]he persons intended to receive the

money [have] received it *irrevocably*." 323 U.S., at 94 (emphasis added.)[5]

Here, the first prerequisite to keeping the money was to "accept" the contract. For, until that was done, the victim, under the agreement, could demand a return of his "advance fee." The mailings involved in the dismissed counts accomplished that purpose. Indeed, forwarding an accepted copy of the service agreement was the sacramental mode of cutting off the victim's contractual right to a refund of his money. It is important to stress that these mailings were key features of the entire scheme, planned from the beginning. The "application" itself provided:

> This agreement shall become effective when accepted at any Regional Office of Lenders Service Corporation. Notification of acceptance shall be made by returning to applicant a copy of this agreement executed by duly authorized personnel. In the event this agreement is not accepted by LSC the entire fee will be refunded (R. 51).

In light of this provision, the indictment correctly charged as an essential step in the scheme mailings designed to "inform said victims that they could not obtain a refund of their fees, and that the contract was not cancellable and that the said victim was bound

[5] Compare *United States* v. *Riedel*, 126 F. 2d 81, 83 (C.A. 7), cited by the Court as illustrative of the type of case distinguishable from the case before it (323 U.S. at 95, n. 8): "A scheme to defraud may well include later efforts to avoid detection of the fraud. * * * Avoidance of detection and prevention of recovery of money lost by the victims are within, and often a material part of, the illegal scheme. Further profit from the scheme to defraud, as such, may be over, and yet the scheme itself be not ended."

thereby and had no recourse for retrieving his money" (R. 8). Only after notification of acceptance did the swindlers obtain even paper title to the funds. Until then, the fraud was incomplete.

It is not a valid objection that defrauders have no real concern for legal rights. The fact is that the more subtle swindlers commonly disguise their transactions in the trappings of legality, not only to lure their victims, but also to delay discovery and to discourage efforts at recovery. The complex scheme alleged here was well suited to that purpose. Having missed his opportunity to withdraw, the gullible victim might well doubt his legal right to a return of his money after receiving formal notice that his offer had been irrevocably accepted. Even after he had begun to suspect the fraud, the difficulties of proving his case might seem insurmountable. It is not unreasonable to suppose that some victims would think themselves barred by not having acted sooner.

The intent of the defendants so to delude their victims is clear from the letters of instruction which accompanied the accepted contracts. These letters delineated a long procedure for the future. In fact, the scheme did not end with the mailings charged. Several subsequent steps (most, if not all, necessarily involving use of the mails) were still to be taken. Data for a loan application was to be furnished by the victim on a form enclosed with the letters; later, a "proof" of the application would be submitted for approval; it had to be returned; the corrected application would then be submitted to loan companies; and,

presumably, the swindlers were then to notify their victim of the outcome. The fact that, in some instances at least, the swindlers actually intended to go through these formalities, empty motions though they were, shows their concern for putting obstacles in the path of quick recovery.

Depending on the victim, this long-drawn-out procedure might be expected to dupe completely, to discourage legal action, or merely to delay efforts at recovery. Since deceivers reportedly have great capacity for self-deception, we might be justified in attributing to the authors of the fraud very high hopes for their scheme. But, whatever their expectation, it is plain that the mailings described were intended to further a plot to obtain, and retain, unearned fees.

Thus, in the setting of the case, even if we follow the district court in looking only to the individual victim as the object of the scheme particularized in each count, we must conclude that the acts alleged, in each case, supported a charge of mail fraud.

B. CONSIDERING THE CONTINUING NATURE OF THE OVERALL PLAN, THE MAILINGS FURTHERED THE SCHEME BY LULLING PAST VICTIMS INTO INACTION SO AS TO PREVENT DISCLOSURE AND PERMIT THE DEFRAUDING OF FUTURE VICTIMS

Though the district court apparently refused so to view it, the scheme charged was a single elaborate plan to defraud an almost endless number of potential victims. The character of the scheme is sufficiently shown by the long-range preparations and complex organization alleged. As we have noted, corpora-

tions were formed, offices were leased, a force of salesmen was hired and trained, and all manner of literature was prepared. All this, obviously, was justified only if the conspirators contemplated a large-scale operation, covering a wide territory, expected to endure for a considerable period. Real success depended on accumulating a long list of victims from the almost inexhaustible supply of loan-hungry small businessmen.

Given the broad expectation of the plotters, the importance of pacifying old "clients" is apparent. Though nothing further was expected to be got from them, it was essential to forestall the worried inquiries of past victims. For, inevitably, the questions would become complaints, then demands, threats, leading soon enough to the loud wail of cheated customers sensing that they have been duped. And, if the resulting adverse publicity itself did not warn off prospective customers, it would not be long before the conspirators themselves would feel compelled to disband before the approaching arm of the law. Thus, one way or the other, discovery of their plight by those already bilked would cut short the fraudulent scheme.

We suggest no new doctrine. As already noted (*supra,* p. 13), in *Kann,* this Court expressly adverted to a case like this one, in which mailings "after the fact" fall under the statutory prohibition. The courts of appeal have uniformly held the statute applicable to the sending of lulling communications to victims who have already parted with their money for the purpose of concealing a continuing scheme

contemplating the defrauding of large numbers of future victims as well. See, *e.g.*, *United States* v. *Earnhardt*, 153 F. 2d 472, 473–474 (C.A. 7), certiorari denied, 328 U.S. 858; *Marshall* v. *United States*, 146 F. 2d 618, 621 (C.A. 9); *United States* v. *Cohen*, 145 F. 2d 82, 90 (C.A. 2), certiorari denied, 323 U.S. 799; *Corbett* v. *United States*, 89 F. 2d 124, 126 (C.A. 8); *Lewis* v. *United States*, 38 F. 2d 406, 415–416 (C.A. 9); *Brady* v. *United States*, 26 F. 2d 400, 401 (C.A. 9), certiorari denied, 278 U.S. 621; *Farmer* v. *United States*, 223 Fed. 903, 910 (C.A. 2), certiorari denied, 238 U.S. 638.

Thus, in *United States* v. *Earnhardt*, *supra*, the Seventh Circuit affirmed convictions based upon the use of the mails to deliver the deeds to lands which the victims had purchased in reliance upon false representations that they were oil-bearing, saying (153 F. 2d at 473–474):

> [T]he scheme described was a general and continuing one, the object of which was to reach as many investors as possible, and to defraud them as many times as possible * * *. That, coupled with the fact that the indictment further charged that defendants sought to allay fears and apprehensions as to the safety of their investments in order to prevent possible action on their part, renders the mailings of the deeds essential steps in the execution of the scheme and not just unrelated events occurring after its completion.

Similarly, in *Marshall* v. *United States*, *supra*, a case involving an "advance rental" scheme similar in many respects to the scheme here, the sending of lulling letters to victims whose money the defendants had already received was held to be covered by the statute.

In language as applicable to the present case as to the one before the court, the Ninth Circuit observed (146 F. 2d at 621):

> [W]here the scheme charged in the indictment involves the continuing solicitation of public interest as well as a continuing relationship between schemer and victims and where letters are sent through the mails to further the relationship and to lull the victims into a sense of security and inaction, the mails clearly are used to accomplish the purpose of the scheme, and the essential ingredients of the mail fraud offense are present.

And in *Farmer* v. *United States, supra,* where the defendants were engaged in a large-scale book fraud, the Second Circuit sustained the application of the mail fraud statute to a lulling letter sent to one of the victims after she had parted with her money, saying (223 Fed. at 910):

> If it stood alone, this letter might not be significant, but with the illumination of the situation which the record affords we think it may fairly be considered as written in furtherance of the general scheme. The scheme was not to defraud a particular individual (e.g., Mrs. Preston), but to defraud whomever the parties to the scheme could persuade to buy. Having been once swindled by Glenn Farmer and Hartley, Mrs. Preston and others in Boston to whom she might relate her experience would probably be immune to the further blandishments of these two enterprising agents; but if the man who got up the books and was evidently the head of the enterprise could persuade her that the publishing house knew nothing of Glenn Farmer and his coadjutor in the swindle, except that Glenn had bought books

> from J. J. Farmer and resold them entirely on his own account, possibly Boston might still remain a territory receptive of the J. J. Farmer books, when cultivated by other of his enterprising agents.

These and similar cases, decided both before and since *Kann* v. *United States*, 323 U.S. 88, refute the district court's assumption that, merely because the particular victims named in the dismissed counts had parted with their money when the mailings charged in those counts occurred, the communications were innocent. These mailings, we again emphasize, were essential parts of the plan, contemplated from its inception. At least where the scheme charged is a continuing one designed to mulct as many victims as possible, the mail fraud statute prohibits a use of the mails for the purpose of forestalling discovery so that future victims may similarly be defrauded.[4]

II. THE CONSPIRACY COUNT IS AMPLY SUPPORTED BY THE REMAINING SUBSTANTIVE COUNTS

The dismissal of 34 of the substantive counts, even if correct, did not require striking the conspiracy charge. The conspiracy count (count 44) alleged that the defendants conspired to use the mails in execution of a scheme to defraud, "which said scheme

[4] Cf. *United States* v. *Comyns*, 248 U.S. 349, sustaining an indictment charging use of the mails in execution of an "advance fee" scheme similar to that charged here. The opinion notes that the purpose of the agreements which the defendants entered into with their victims, as alleged in the indictment, was to delay the victims' demands for the repayment of their advance fees and to prevent the victims from "discovering the fact they had been defrauded and disclosing said fact to others" (at 351–352).

* * * and use of the mails in furtherance thereof are described and set forth in the previous counts of this indictment," and, specifically, that they agreed "to place * * * in authorized depositories for mail matter * * * certain letters, circulars and other written and printed matter, all as charged and alleged in the previous counts of this indictment" (R. 31). The mailings charged in all 43 of the substantive counts (in addition to other actions) were alleged as overt acts (R. 32–34).

Thus, the charged objective of the conspiracy included the violations described in the substantive counts which the court sustained (*supra*, p. 9), as well as the mailings involved in the invalidated counts. In these circumstances, there was no sound basis for dismissing the conspiracy count in its entirety. A conspiracy to commit an offense or offenses against the United States is within the prohibition of the conspiracy statute though its objective includes also acts which are innocent. *Allen* v. *United States*, 4 F. 2d 688, 692 (C.A. 7), certiorari denied *sub nom. Mullen* v. *United States*, 267 U.S. 598. Under the court's ruling on the substantive counts, the proper disposition of the conspiracy count would have been to overrule the motion to dismiss, limiting the government's proof to the matter alleged in the remaining portions of the indictment, and treating the rest as surplusage. Cf. *Ford* v. *United States*, 273 U.S. 593, 602; *Salinger* v. *United States*, 272 U.S. 542, 548–549; *United States* v. *Goodman*, 285 F. 2d 378, 380 (C.A. 5), certiorari denied, 366 U.S. 930; *United States* v. *Strauss*, 283 F. 2d 155, 159 (C.A. 5).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court, insofar as it dismisses all but nine counts of the 44-count indictment, should be reversed.

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AUGUST 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1962